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IN THE
Supreme Court of the United States

In re Triple S Restaurants, Inc., Debtor

DONALD M. HEAVRIN,

Petitioner,

v.

J. BAXTER SCHILLING, Trustee,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Does an attorney who does not participate in bankruptcy proceedings have a duty to submit detailed disclosures of all pre-petition payments received, pursuant to 11 U.S.C. § 329 and Bankruptcy Rule 2016, and does the bankruptcy court have jurisdiction to sanction an attorney not participating in bankruptcy proceedings for failing to make such disclosures?**

- II. Did the Court of Appeals' construction of 11 U.S.C. § 329, subjecting attorneys not before the bankruptcy court to sanctions for nondisclosure of pre-petition fee arrangements, and retroactively applying this judicial expansion of the narrow, precise statutory language of § 329 to Petitioner in an unpublished decision that lacks prospectivity, violate Petitioner's right to due process?**

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OPINIONS OF THE LOWER COURTS

The decision of the United States Court of Appeals for the Sixth Circuit, *In re Triple S Restaurants, Inc.*, 130 Fed. Appx. 766 (6th Cir. 2005), was not selected for publication in the Federal Reporter, but is reprinted at Pet. Apx. A1.

The opinion and order of the United States District Court for the Western District of Kentucky, *In re Triple S Restaurants, Inc.*, 306 B.R. 191 (W.D. Ky 2004), is reprinted at Pet. Apx. A14.

The opinion and judgment of the United States Bankruptcy Court for the Western District of Kentucky in Case No. 94-32848(3) is reprinted at Pet. Apx. A24.

JURISDICTION

The Court of Appeals' judgment was entered May 10, 2005. Petitioner's request for an extension of time in which to file this Petition for Writ of Certiorari was granted on August 10, 2005 extending the time in which to file the instant petition to and including October 7, 2005. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case is governed by 11 U.S.C. § 329 which is reprinted at Pet. Apx. A38. Bankruptcy Rules 2016 and 2017 are also integral to the case, and are reprinted at Pet. Apx. A39 and A42.

STATEMENT OF THE CASE

Petitioner Heavrin is an attorney and dating back to 1972, he acted as general counsel for numerous companies owned by his stepfather, Robert E. Harrod. In 1988, he helped Harrod incorporate Triple S Restaurants, Incorporated ("TSR") which became a franchisee of Sizzler International, Incorporated ("Sizzler").

In 1992, TSR began to suffer financial difficulties. Consequently, in August of that year, Petitioner's work for TSR increased substantially. As a result of Petitioner's work in negotiating with TSR's creditors, by December 1992, TSR once again became profitable.

During this time, Petitioner charged TSR an hourly rate for legal services of \$125 per hour and the majority of his legal practice was dedicated to TSR. Until this time and in consideration of his stepfather, each month Heavrin determined how much TSR could pay of his outstanding legal fee and only billed TSR for that amount. However, by December 1992, Heavrin's unpaid legal fees for TSR reached approximately \$30,000.

Due to the size of outstanding bill and the increasing amount of time Petitioner was devoting solely to TSR matters, Harrod, suggested Petitioner simply go on retainer with TSR in the amount of \$10,000 per month for the next 36 months. In exchange for the retainer agreement, Petitioner forgave the \$30,000 in past due legal fees for prior representation. The retainer also secured for TSR the ready availability of Petitioner over the next 36 months. Starting January 1, 1993, TSR became Petitioner's primary client having first right to all of his legal services and time.

Unfortunately, TSR's financial situation worsened due to an outbreak of E. coli in the Sizzler restaurants on

the west coast in March of 1993 and due to the actions of its primary creditor McDonald Douglass Financial Corporation (MDFC). As a result, TSR had to seek protection under the Bankruptcy Code in a final attempt to solve its financial crisis. Petitioner referred the TSR bankruptcy matter to another attorney, David Chinn (Chinn), who regularly practiced in bankruptcy court, and Chinn was retained by TSR to represent it in bankruptcy.

On September 30, 1994, approximately twenty-one (21) months after Petitioner entered into the retainer agreement with TSR, Chinn, prepared, signed and filed the Petition for Relief under Chapter 11 of the Bankruptcy Code on behalf of TSR. **Petitioner did not act as counsel for TSR in the bankruptcy case.** *In re Triple S Restaurants, Inc.*, 306 B.R. 191, 195 (W.D. Ky. 2004) (“Heavrin was counsel for TSR prior to bankruptcy. He was not counsel for the debtor TSR.”). Chinn disclosed all compensation paid to Heavrin by TSR within the one-year preceding bankruptcy under Section 21 of the Petition, designating the payments as compensation to an “insider” paid within one year immediately preceding the commencement of the case. Chinn testified that because Petitioner’s stepfather, Robert Harrod, was the President of TSR prior to his death in August 1994, he believed Petitioner was properly classified and disclosed as an “insider” under the applicable bankruptcy law and rules.

In or about December 1994, J. Baxter Schilling (Trustee Schilling) was appointed as the trustee in the TSR Chapter 7 case. As Trustee, Schilling hired himself as the attorney for the estate of TSR and on July 30, 1996, filed an Adversary Proceeding against Petitioner pursuant to the provisions of 11 U.S.C. § 329 seeking recovery of all attorney fees paid Petitioner by TSR. The bankruptcy court twice entered Summary Judgment in